Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

HENRY LEWIS MCKINNEY
and LILLIE MARIE MCKINNEY
Petitioners,

v.

CLIFFORD L. DICK
and PATRICIA A. DICK
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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85 pp

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A. DID THE KANSAS COURT OF APPEALS DENY THE PETITIONERS DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT BY MISREPRESENTING THE TRIAL COURT'S DECISION OF SUMMARY JUDGMENT FOR THE PETITIONERS WHEN THEY STATED THAT PETITIONERS ACTUALLY LOST THE CASE BECAUSE THEIR REQUEST FOR RETURN OF $6,000 MONIES PAID FOR PURCHASE OF REAL ESTATE WAS DENIED?

B. DID THE COURT OF APPEALS' RULING ON THE APPLICATION OF THE KANSAS CONSUMER PROTECTION ACT (KCPA) TO THIS CASE DENY PETITIONERS DUE PROCESS AND EQUAL PROTECTION AVAILABLE UNDER LAW?

C. DID THE KANSAS COURT OF APPEALS' RULING ON "DAMAGES" REWRITE THE 1988 AND 1990 CONTRACTS AND THE TRIAL COURT'S DECISION, AND

ERRONEOUSLY SUBJECT PETITIONERS TO "DAMAGES" AFTER THEY WERE AWARDED SUMMARY JUDGMENT, THUS DENYING PETITIONERS' THEIR FOURTEENTH AMENDMENT RIGHTS OF EQUAL PROTECTION?

D. DID THE COURT OF APPEALS AND THE TRIAL COURT DENY PETITIONERS' DUE PROCESS AND EQUAL PROTECTION BY IGNORING MR. MCKINNEY'S MENTAL CONDITION WHEN THE 1990 CONTRACT WAS SIGNED?

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

THE PETITIONERS, HENRY LEWIS MCKINNEY, AND LILLIE MARIE MCKINNEY, PROCEEDING PRO SE, hereby petition this Court to issue a Writ of Certiorari to review the Kansas Court of Appeals' Opinion, filed July 30, 1993. Review denied by the Kansas Supreme Court on September 28, 1993. Extension to file a petition

for a writ of certiorari on January 26, 1994, granted by Associate Justice of the United States Supreme Court Ruth Bader Ginsburg on December 20, 1993.

II. OPINIONS BELOW

(a) On July 30, 1993 the Kansas Court of Appeals issued its unpublished opinion which is attached hereto and designated as **APPENDIX A.**

(b) On September 28, 1993, the Kansas Supreme Court denied review of the Kansas Court of Appeal's decision, which is attached hereto and designated as **APPENDIX B.**

III. JURISDICTION

(a) The date of judgment which is sought to be reviewed is July 30, 1993, with Review denied on September 28, 1993.

(b) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are due process and equal protection under the Fourteenth Amendment of the Constitution.

Statutory provisions involved are K.S.A. 60-211, which forbids frivolous law suits and arguments and Gordon v. Gordon, 218 Kan. 686, 545 P. 2d 328 (1976), which states "As a general rule anything that savors of acquiescence in a judgment by a party to a lawsuit cuts off the right to appellate review."

Also involved is State v. Fisher, 233 Kan. 29, 661 P.2d 791 (1983), which states as a general rule that the appellate courts will not consider issues raised for the first time on appeal.

Finally, it is a general principle of Kansas law that it is the duty of the courts to enforce contracts as they are legally concluded, not to make new contracts. Bailey

v. Talbert, 179 Kan. 176, Syl. 6, 294 P.2d 220 (1956)

V. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This litigation originates from two contracts of 1988 and 1990 for 23 acres of real estate in Jefferson County between the Dicks and the McKinneys.

The 1988 contract failed by contractual agreement because very specific contingencies were not met. The McKinneys notified the Dicks by mail that the contract failed, but the Dicks refused to return $2,000 earnest money, as required by the contract.

Petitioner Henry Lewis McKinney had serious kidney failure with complications beginning in the fall of 1987 and stopped teaching at the University of Kansas after the spring term of 1988 except for a few advanced students. His health continued to fail and by

the end of 1989, Mr. McKinney was critically ill and under extreme duress.

At the same time the Dicks were harassing the McKinneys to sign another contract to buy their property since the 1988 contract had failed.

Repeatedly assured that the Dicks' access to the property was fine and that the abstract of title was good, and under great and constant pressure from the Dicks, the McKinneys signed a new contract on January 20, 1990, for the same 23 acres. Medical testimony has been introduced in the Record that Mr. McKinney was mentally unable because of complications from his severe kidney failure to conclude any contracts whatsoever. Record, III, 720 (Exhibit B)

The following month, the McKinneys learned that the Dicks had fraudulently misrepresented their road access and their abstract definitely was not marketable. The

McKinneys had the contractual right to make requirements for the abstract to pass marketability to their satisfaction. The Dicks tried to evade the contractual requirement by withholding the abstract from the McKinneys, and instead had their attorney send a letter saying the abstract was good. The McKinneys rescinded the contract.

Closing did not occur on March 1, 1990; on March 6, 1990 the Dicks filed suit against the McKinneys. The Dicks subsequently filed nonconforming motions for summary judgment. The McKinneys filed a number of motions for summary judgment, none of which was answered by the Dicks.

Under these facts, because the Dicks failed to answer the McKinneys' motions, summary judgment for the McKinneys was mandatory under Kansas (Supreme Court Rule 141(b)) and Federal law (Rules of Practice and Procedure of the United States District Court,

Court of Kansas, Rules 206(c)(g)) and that should have ended this lawsuit. The facts and law have remained the same since then except for Mr. McKinney's medical condition: he now depends on dialysis in order to survive.

Judge Nafziger paid no attention to Kansas Supreme Court Rule 141(b), the factual situation, or the Fourteenth Amendment and refused to grant summary judgment for the McKinneys even after reconsideration was requested. The McKinneys appealed to the Kansas appellate courts who refused jurisdiction at that time for technical reasons.

The McKinneys then moved for Judge Nafziger to recuse himself for conspicuous bias and prejudice on behalf of the Dicks. November 11, 1991. In March 1992, Mr. McKinney handed Judge Nafziger a detailed Affidavit of Bias and Prejudice, and Judge Nafziger then finally recused himself and was replaced by

Judge Michael G. Moroney, Wyandotte County, Kansas.

After Judge Moroney assumed control of Dick v. McKinney, the McKinneys, individually, filed motions for summary judgment and a Motion to Dismiss; the Dicks did not file similar motions. The trial court awarded a broad-based summary judgment to the McKinneys: "15. The Motion for Summary Judgment is granted, insomuch as it comports with the above mentioned rulings." Judge Michael G. Moroney, Journal Entry and Memorandum Decision, Record, III, 922. Emphasis added.

Summary Judgment actually also extinguished two apparent exceptions by the trial court: the issue of returning the $2,000 (earnest money) and the $4,000 (compensation) to the McKinneys; both items were included in many places in the McKinneys' motions. As a matter of law, the Dicks conceded the points

by failing to answer motions for summary judgment.

Both parties asked for reconsideration. The Dicks wanted more money, and the McKinneys wanted the return of their $6,000 as the facts and the law required. The trial court, however, denied reconsideration.

The Dicks appealed to the Court of Appeals ON ONE POINT ONLY, saying that they wanted more money even though they lost summary judgment.

The McKinneys also appealed on the basis that they had won summary judgment and that the trial court had recognized and accepted the McKinneys' specific points in the motions for summary judgment that the Dicks had already conceded by failure to answer, namely among other points, the $6,000 should be returned to the McKinneys.

On July 30, 1993, the Court of Appeals rejected or attacked almost every point in the

McKinneys' 43 page appeal brief, whether the point was subject to appellate review or not. Even the McKinneys' award of summary judgment was, in effect, negated by the qualifier that the Dicks really won the case because they got the $6,000.

The McKinneys asked, with supporting motions, the Kansas Supreme Court to review the Court of Appeal's decision to allow the Dicks to seek any damages they could prove even though the McKinneys won summary judgment. The trial court had never intended allowing the Dicks to seek "damages" and has said so. See **App. C**, below.

The Kansas Supreme Court denied review, and the McKinneys have appealed to the United States Supreme Court for relief under the Fourteenth Amendment issues of due process and equal protection.

Dick v. McKinney is essentially a local contract dispute over real estate. The Dicks

are using the courts to ruin the McKinneys financially just as they did heart patient Karl Ganz on his hospital bed. Deposition of Clifford L. Dick, Record, VII, 85-89. To accomplish their goal they and their friends have suspended the McKinneys' constitutional rights in the Fourteenth Amendment.

B. STATEMENT OF THE FACTS

The litigants engaged in two real estate contracts in 1988 and 1990 for purchase of the Dicks' real estate in Jefferson County, Kansas. The 1988 contract failed because, as the Court of Appeals has admitted, many "contingencies were not met, and the sale was never completed." Court of Appeals Opinion, App. A, p. 44, below.

The 1990 contract also failed. The trial court recognized that rescission was proper because the Respondents fraudulently misrepresented their entrance road access. Nowhere

did the trial court reject that prominent point. The Dicks had admitted that the access was misrepresented by failing to answer the McKinneys' motions for summary judgment: much case law supports the same conclusion.

Respondents filed suit five days after closing had been scheduled: the specific terms of the contract allowed only foreclosure after 90 days. In their suit, the Dicks tried to enforce both the 1988 (which had died) and the 1990 contracts, a violation of Kansas law. Griffith v. Stout Remodeling, Inc., 219 Kan. 408, 548 P.2d 1238 (1976)

The Petitioners answered, among other things, that their rescission of the said contract was properly based on fraudulent misrepresentation and failure of the Dicks to furnish the McKinneys with a satisfactory, marketable and unencumbered abstract of title by March 1, 1990, which was a vital requirement of the 1990 contract. The Dicks have

repeatedly admitted that they never furnished any abstract of title to Mrs. McKinney, as the Record confirms.

During 1990, Respondents claimed to have abandoned the 1988 contract, but they never have. They have still attempted to date their purported "damages" from the time of the 1988 contract, and no doubt will continue to do so if the case is remanded to the District Court.

Eventually, motions for summary judgment were filed. The first two motions by Respondents were clearly not within the definition of motions for summary judgment. The third motion was not even signed, first appeared on February 21, 1991, with no notice, after court had adjourned, the clerk wrote a false date on it, and it was fraught with so many legal problems that the McKinneys moved several times to strike it under K.S.A. 60-211, as the Record shows. A biased and prejudiced judiciary under Judge Nafziger would not even

comment or consider the matter, thus denying Petitioners due process and equal protection. Petitioners answered the Dicks' illegal filing anyway, showing the "filing" was without merit.

Judge Nafziger issued a decision on May 17, 1991. Petitioners asked for reconsideration, pointing out that the Court was clearly denying mandatory Kansas and Federal law.

Judge Nafziger, ex parte, continued to ignore procedures relevant to summary judgment and denied the McKinneys' motion. He did not critique the McKinneys' motions. The McKinneys appealed but the appellate courts declined at that time to assume jurisdiction, supposedly on technical grounds.

After his decision, Judge Nafziger eventually recused himself for conspicuous bias and prejudice on behalf of the Dicks, and was replaced by Judge Michael G. Moroney, Wyandotte County, Kansas.

Both Petitioners quickly filed motions for summary judgment and a Motion to Dismiss was also adopted by Henry Lewis McKinney from Lillie Marie McKinney's filings. **ALL PHASES OF THE LITIGATION WERE COVERED THOROUGHLY**. On July 13, 1992 the trial court awarded broad-based summary judgment to the McKinneys but denied their request for return of the $6,000.

In a letter dated July 24, 1992, the Dicks' counsel, Richard Senecal, asked Judge Moroney if there was going to be a trial on "damages," because he claimed to think that was the court's intent. The trial court answered on August 13, 1992, that the litigation was over and there would be no trial. **APP. C**, below.

Respondents nevertheless appealed for more money; Petitioners then appealed that the trial court decision dictated the return of the $6,000 to them, and that damages and punitive damages were due to them.

The Court of Appeals adopted the Respondents "damages" argument, and disagreed with almost everything presented by the McKinneys, contrary to the trial court's decision and whether or not the matter was subject to appellate review.

The Kansas Supreme Court denied review without checking the accuracy of the Court of Appeal's Opinion. They also completely ignored the trial court's decision and the Record, which tells a story quite different from the Court of Appeals' version.

VI. ARGUMENTS

FIRST ARGUMENT: THE KANSAS COURT OF APPEALS DENIED THE PETITIONERS DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT BY MISREPRESENTING THE TRIAL COURT'S DECISION OF SUMMARY JUDGMENT FOR THE PETITIONERS WHEN THE COURT STATED THAT PETITIONERS ACTUALLY LOST THE CASE BECAUSE THEIR REQUEST FOR RETURN OF $6,000 MONIES PAID FOR PURCHASE OF REAL ESTATE WAS DENIED.

The trial court explicitly awarded a very broad-based summary judgment for Petitioners.

There was really only one exception: the Petitioners were denied return of earnest monies/compensation paid, amounting to $6000.

The trial court alleged that the McKinneys had permitted the 1988 contract to fall through. It is unclear how they supposedly did this because the contract itself specifies its terms, which said the contract became null and void if: (1) a mortgage commitment, which is specifically described, was not received on or before May 1, 1988, (2) said commitment could not have a prepayment penalty, (3) clear title had to be furnished, (4) a written termite report had to be given the McKinneys, (5) the McKinneys had to sell their own house and generate at least $95,000 cash, etc. These matters were thoroughly discussed in the McKinneys' Memorandum in Support of [the Motion for] Partial Summary Judgment, Record, I, 247-324. 1/23/91

Also discussed therein was the Dicks' abstract of title, which was not marketable. Record, I, 247-248.

These issues were discussed at length in numerous subsequent motions for summary judgment by the McKinneys before May 17, 1991. The Dicks **never answered** even one of those motions, and as a matter of mandatory law conceded all the material facts. Judge Moroney recognized this point in his award of summary judgment to the McKinneys. Record, III, 845-860, at 856. The issues of the bad abstract of title and rescission were thoroughly covered. Record, III, 729-741. See the McKinneys' Appellees' Brief of Cross-Appeal, pp. 23-28.

The Court of Appeals' claim, that the McKinneys lost the case because of the $6,000 being given to the Dicks, is fraudulent. The trial court manufactured new "facts", and

misinterpreted the contracts to draw erroneous conclusions about the $6,000.

Virtually everything the trial court said about the $2,000 and the 1988 contract was factually wrong. Appellees' Brief of Cross Appeal, pp. 23-25. See also Mr. McKinney's Petition for Review [to the Kansas Supreme Court], pp. 3-8. The $2,000 belonged to the McKinneys.

In regard to the 1990 contract, the trial court was wrong about the abstract of title. It claimed that rescission on the basis of failure by the Dicks to furnish both the McKinneys a marketable, unencumbered abstract of title was "frivolous", to use Mr. Senecal's term in this application.

This view is unwarranted. On February 13, 1990, said abstract of title was definitely unmarketable. An admitted cloud was present; it was not a "possible", but a real problem, and the real estate taxes had not been

paid. The Dicks knew about these problems and tried to lure the McKinneys into buying property with a bad abstract and poor access. They assumed that since Mr. McKinney was very ill, he would not notice the abstract problems anyway. But the Dicks' abstracter raised such a big red flag a child could have seen it. Then Mr. Dick and his attorney admitted problems existed.

This course of events has been recounted over and over again in numerous places. To kill the vampire of attempted disinformation, the McKinneys filed a motion supposedly puting the matter to rest forever on these points: (1) the abstract of title was not good on February 13, 1990. (2) the Dicks claimed they demonstrated marketability on February 22, 1990, but that mistaken claim was based merely on their own lawyer's statement that it was okay. (3) The 1990 contract did not care what Mr. Swoyer, a lawyer censured by the

Kansas Supreme Court for conflict of interest and lying, said in a letter. It required that the Dicks furnish both the McKinneys with a marketable, unencumbered abstract of title, which is a physical document, so they could make requirements to pass marketability. (4) After February 13, 1990, neither the Dicks nor their lawyer furnished any abstract to either McKinney until late in 1990, long after closing was scheduled on March 1, 1990. A court order was required to do so then. See Mr. McKinney's detailed Defendants Response to Plaintiffs' Response to Defendant Henry Lewis McKinney's Motion for Summary Judgment, etc. Record, III, 892-917. 7/9/92. Cf. Appellees' Brief of Cross-Appeal, pp. 29-32.

The Court of Appeals could have easily read these filings which leave no room for speculations. The trial court was wrong on the marketability issue. The Dicks conceded the McKinneys' arguments on summary judgment

by not answering. The trial court conceded this issue as a matter of law by awarding summary judgment to the McKinneys. The Court of Appeals has simply quoted insubstantial conclusions that were wrong, and have been proven wrong.

However, the trial court itself allowed the 1990 contract to die anyway: **THE TRIAL COURT NEVER DENIED AT ANY TIME THE PETITIONERS' ARGUMENTS THAT RESCISSION WAS PROPER BECAUSE RESPONDENTS FRAUDULENTLY MISREPRESENTED THEIR ACCESS. THAT POINT IS PART OF THE COURT'S AWARD OF SUMMARY JUDGMENT.**

The issue of the 1990 contract is also well-covered in many motions by the McKinneys, which were conceded by failure to answer. There is no doubt that rescission for fraudulent misrepresentation canceled the 1990 contract.

Why did the trial court err about the $6,000 and rewrite the two contracts? The

answer is that the court wished to mollify the Dicks' greed, to appease them for having lost the case, in order to conclude this meritless litigation.

To cover up the fact that the rescission argument survived, the Court of Appeals claims the fraud argument was "rightfully disregarded by the trial court." This is false and ignores the broad-based award of summary judgment: "The Motion for Summary Judgment is granted, insomuch as it comports with the above mentioned rulings." Record, III, 923. Not one positive point is specifically listed in the statement above, and the McKinneys made numerous points, almost all of which were conceded.

Summary judgment extinguished **ALL THE DICKS' ARGUMENTS**. The Court of Appeals only pretends not to understand the effect of the trial courts' opinion and the McKinneys' motions for summary judgment.

If clearly biased courts are allowed to ignore due process and equal protection under the law, where do we go for justice? The McKinneys won, but lost? It should not be tolerated.

SECOND ARGUMENT: THE KANSAS COURT OF APPEALS HAS INTENTIONALLY MISREPRESENTED THE KANSAS CONSUMER PROTECTION ACT, K.S.A. 58, ARTICLE 30, AS IT APPLIES TO DICK V. MCKINNEY. SUCH MISREPRESENTATION VIOLATES PETITIONERS' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

On February 1, 1991, the McKinneys filed an amended petition to their pleadings, which was heard by the Court, and approved, without Respondents' opposition, by the Court. The Dicks failed to respond as procedurally required under K.S.A. 60-208(d), and they thereby admitted all contentions as a matter of law. One of these contentions was that the

Dicks violated the Kansas Consumer Protection Act.

The Kansas Court of Appeals states, however, that Respondents were exempted from well-established procedures because they supposedly had denied the McKinneys' other earlier contentions in their original answers about one year earlier. This is an intellectually bankrupt contention. The Court's statements, which again originate from the Dicks, and never appeared before the appellate level, are false, meritless and frivolous and do not excuse the Dicks from following normal procedures.

Furthermore, evidence from the Record establishes the applicability of the Kansas Consumer Protection Act (KCPA, K.S.A. 58-624ff.) to Dick V. McKinney.

This unacceptable example of allowing the Dicks to violate procedures by failing to answer as required by law, as often happened

for the Dicks in this case, raises serious questions about the ethics of the Court of Appeals, about knowing the law and being unswayed by partisan interests.

The Court of Appeals, quoting the Consumer Protection Act itself, contends in App. A, p. 65-67, below, that the "Dicks cannot be characterized as 'suppliers' under the Consumer Protection Act because it "means a manufacturer, distributor, dealer, seller, lessor, assignor, or other person, who in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer." (Emphasis added by that Court) K.S.A. 1992 Supp. 50-624(i) "Therefore the Act cannot be applied to them."

By their own testimony in depositions, the Dicks have engaged in building barns and houses to sell as carpenters, general builders, contractors, and real estate persons for

many, many years: it has been their livelihood. (Depositions of Clifford L. and Patricia A. Dick, Record, VII, 1,3). Building and selling said buildings and real estate are clearly consumer oriented. They often have sold directly to the public as in the cases of Mr. and Mrs. Karl Ganz (Record, VII, Deposition of Clifford L. Dick, pp. 85-86, 89.) and Mr. and Mrs. Don Newell. (Newell v. Dick, case no. 91-C-53, pending)

Misrepresentation by the Court of Appeals of the Dicks' business and livelihood materially affects this case, and intentionally denies Petitioners due process and equal protection under the law. The Court by its statements proves it is unfamiliar with recent Kansas law on the KCPA such as Porras v. Bell, 18 Kan App. 2d 569 (1993), decided in its own appellate court, not to speak of the Record. The Court of Appeal's conclusion is clearly wrong and unsupported by the facts regarding

KCPA, and KCPA should be applied in full force to Dick v. McKinney because the Dicks have admitted the application long ago.

The trial court included KREBSA, Kansas Real Estate Brokers and Salesmen Act, in its award of summary judgment; its' application to this litigation is too obvious to deny intelligently. This Petitioner's point is that the Dicks are heavily into real estate as part of their construction business and under KREBSA, K.S.A. 58-3062(a) (31), and they should be forbidden from not informing their clients about problems with real estate they are selling. They have acquired millions of dollars of real estate and should have a duty to be honest about those dealings. Their dishonesty needs to be stopped. An incomplete inventory of their holdings in the Record contains 46 items. Record, II, 476-672. Exhibit 43.

THIRD ARGUMENT: THE KANSAS COURT OF APPEALS' RULING ON "DAMAGES" REWROTE THE 1988 AND 1990 CONTRACTS AND THE TRIAL COURT'S DECISION, AND ERRONEOUSLY SUBJECTED PETITIONERS TO "DAMAGES" AFTER THEY WERE AWARDED SUMMARY JUDGMENT. SUCH ACTION DENIED PETITIONERS' THEIR FOURTEENTH AMENDMENT RIGHTS OF EQUAL PROTECTION.

The argument that Petitioners won essentially unrestricted summary judgment, but Respondents still deserve damages because the trial court denied Petitioners the return of $6,000, was **NOT** intended by the trial court (See App C., below), and is not appropriate.

The 1990 contract does **NOT** discuss damages at all, as the Respondents and Court of Appeals agree. The 1990 contract did state, however, that "Anything not expressly set forth or referred to in the contract is null and void." Record, I, 58, par. 17.

Petitioners also pointed out in the McKinneys' Memorandum for Defendants' Motion to Dismiss (Record, II, 452-463) that Respondents had done nothing to mitigate their purported damages and therefore had no damages coming. Osborn v. Crego, 226 Kan. 212, 596 P.2d 1233 (1979). As usual Respondents did not answer the Petitioners' Memorandum and therefore admitted all statements of fact, making damages unavailable to Respondents. See Appellees' Brief of Cross Appeal, p.40. The Court of Appeals ignored this evidence and denied Petitioners due process and equal protection.

EQUALLY IMPORTANT IS THAT THE TRIAL COURT LET STAND PETITIONERS' ARGUMENT THAT FRAUDULENT MISREPRESENTATION OF RESPONDENTS' ACCESS ROAD JUSTIFIED RESCISSION; THE TRIAL COURT DID NOT REJECT IT.

By failing to reject the fraud argument, the trial court allowed the 1990 contract to

die. The legal consequence was that the $4,000 should have been returned to Petitioners anyway.

The Court of Appeals has tried to argue the case again, although the award of summary judgment was not appealed and was not subject to appellate review.

The Court of Appeals has rewritten the 1988 and 1990 contracts to give the Dicks more favorable new terms, to misrepresent and omit the arguments, and to lie unethically about facts and law. Using the conclusion of Respondents', that the Petitioners won summary judgment but they lost the case as a springboard, the Court of Appeals also adopted Respondents' arguments about "damages", which had already been rejected by the trial court.

All Petitioners' arguments have been ignored, thus denying them due process and equal protection under the law. There was never any attempt by the Court of Appeals to

recognize the significance of Petitioners' award of summary judgment, which is treated as irrelevant, an insignificant impediment to giving Respondents' "damages".

Judge Moroney awarded summary judgment to Petitioners but, as a gesture to try and end the litigation, gave the $6,000 to Respondents, which summary judgment required be returned to Petitioners. The Court of Appeals has tried to reargue and undo the summary judgment award when the award was not subject to review. A careful textual analysis of the Court of Appeals' Opinion reveals that most of said opinion focuses on the summary judgment, which was not subject to review, and on attempts to rewrite the 1988 and 1990 contracts with new terms more favorable to the Dicks, The goal was to undermine the trial court's opinion in general.

The Court of Appeals' Opinion opposes the trial court's Memorandum Decision. Because

the Kansas Supreme Court did not review the Court of Appeals' opinion closely, or the trial court's opinion, or the Record, it has been necessary to seek relief for constitutional violations with the United States Supreme Court. Without said relief, the Respondents will seek unlimited damages from their local court, after losing the case, and constitutional rights will continue to be ignored in Kansas.

FOURTH ARGUMENT: THE COURT OF APPEALS AND THE TRIAL COURT DENIED PETITIONERS' EQUAL RIGHTS OF PROTECTION BY IGNORING MR. MCKINNEY'S MENTAL CONDITION WHEN THE 1990 CONTRACT WAS SIGNED.

Petitioner Henry Lewis McKinney experienced serious kidney failure beginning in the fall of 1987 and stopped teaching at the University of Kansas after the spring term of 1988 except for a few advanced students. His health continued to fail, and by the end of

1989, Mr. McKinney was critically ill and under extreme duress.

Extensive medical testimony has been introduced in the Record that Mr. McKinney was mentally unable because of complications from his severe kidney failure to conclude any contracts whatsoever. Record, III, 720 (Exhibit B) All this fundamental evidence has been swept under the rug, but it was a major component of the McKinneys' amended petition of February 1, 1991. Record, II, 330-335. It should not be overlooked, because the Dicks failed to answer and have admitted the major role Mr. McKinney's health has played in this litigation. The issue was preserved in Mrs. McKinney's Petition for Review, pp. 2-3.

VII. REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The United States Supreme Court should issue a writ of certiorari to Petitioners to

prevent a gross miscarriage of justice and numerous violations of the Fourteenth Amendment to the Constitution.

The Kansas Court of Appeals has abandoned law to issue an overtly biased and prejudicial presentation in favor of the Respondents which will not withstand serious appellate review. The court's decision even argues that while it is true that the McKinneys were awarded an extremely broad-based summary judgment, the Dicks actually won because the trial court denied the McKinneys the return of their $6,000!

Respondents have claimed "damages" and a prejudiced Court of Appeals wishes to allow the Respondents to argue for as many "damages" as they can establish before a local court. <u>They</u> lose the case and <u>they</u> seek "damages"! How could Petitioners win so overwhelmingly in the trial court and yet really lose, and then

even more paradoxically be subject to unlimited "damages"?

The Court of Appeals' Opinion opposes the law, the facts, the contracts between the parties, the trial court's decision and the Fourteenth Amendment to the Constitution. The McKinneys should be granted a writ of certiorari to prevent a miscarriage of justice.

CONCLUSION

The trial court issued broad ranged summary judgment for the McKinneys, but rejected their request for the return of their $6,000. In light of the Court's summary judgment award, and the facts, the law, and the contracts, the $6,000 should have gone to the McKinneys because that is the intent of the 1988 and 1990 contracts.

The trial Court thought that the McKinneys should win the case, and the Dicks should receive a gratuity of $6,000 in an attempt to

end the litigation. To accomplish this the trial court had to re-write parts of the contracts of 1988 and 1990.

The McKinneys' Memorandum in Support of Partial Summary Judgment, Record, I, 247-324, 1/23/91, lays out the material facts clearly on the 1988 contract and discussed the abstract issue of the 1990 contract.

The 1988 contract itself, by its own terms, required the termination of said agreement, all of which the Respondents acquiesced in by failing to answer under Supreme Court Rule 141(b), a point which the trial court has confirmed in its decision. See Petitioners' Motion for Summary Judgment. . .Record, III, 859. Said motion settled both the 1988 and 1990 contracts.

Further support for the award of summary judgment is seen in the trial court's conspicuous failure to exclude Petitioners' argument that rescission was proper for Respondents'

fraudulent misrepresentation of their access road. Therefore, the 1990 contract was properly canceled.

Even if the trial court erroneously thought the 1990 contract survived the abstract problem (see Defendants' Response to Plaintiffs; Response to Defendant Henry Lewis McKinney's . . .Record, III, 892-917, which should have settled that issue), **RESCISSION FOR FRAUDULENT MISREPRESENTATION SURVIVED**, and the 1990 contract died a death just as final as if the trial court accepted both arguments.

The Respondents appealed on the sole point that they have the $6,000, so they deserved more. **THEY DID NOT APPEAL THE TRIAL COURT'S AWARD OF SUMMARY JUDGMENT NOR DID PETITIONERS.**

The McKinneys have stressed that the trial court's decision confirmed the mandatory nature of Supreme Court Rule 141(b), and also KCPA, which was actually admitted by Respon-

dents' failure to answer in February 1991. All these matters extinguished Respondents' arguments, including the frivolous request for "damages", their sole goal from the beginning.

These matters discussed immediately above were the focus of appeal. The Court of Appeals in violation of Kansas law attempted to reconfigure the trial court's decision of summary judgment which was not on appeal. Gordon v. Gordon, 218 Kan 686, 545 P.2d 328 (1976); it has attempted to rewrite the decision and the contracts to benefit the Dicks. Bailey v. Talbert, 179 Kan 169, 294 P.2d 220 (1956); it misrepresented the facts and the law; it omitted certain crucial facts; and accepted lies in lieu of established facts; and finally the Court of Appeals presented a superfluous, lengthy discussion of "damages" which were, by the 1990 contract, unavailable to Respondents. See App. D, below.

Why was it necessary to lie about what the trial court said? Why was it necessary to rewrite the 1988 and 1990 contracts? Why was it necessary to present lies and deceptions about the facts of the case? Why was it necessary to discuss issues decided by the trial court and no longer subject to discussion and not even on appeal?

Without question the Court of Appeals was attempting to justify giving the McKinneys' money to the Dicks. A full textual analysis reveals that decision was a hatchet job on the McKinneys' award of summary judgment -- that seems to be what the Court of Appeals really tried to reverse, not just the point about "damages". How could the Court of Appeals reverse what was not on appeal and not available for appellate review?

The Kansas Judicial System and Mangiaracina v. Gutierrez, 11 Kan. App. 2d 66, 730 P. 2d 1109 (1988), tell us that the scales of

justice weigh equal, but they have not in Dick v. McKinney. What we have really seen is an unconstitutional attack on the pro se litigant as much as anything else.

DATED this 25th day of January, 1994.

Respectfully submitted,

Henry Lewis McKinney

Henry Lewis McKinney
Submitting Pro Se
1230 W. 28th Court
Lawrence, Kansas 66046
(913) 842-7425

APPENDIX A
NOT DESIGNATED FOR PUBLICATION

No. 68,581

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CLIFFORD L. DICK and PATRICIA A. DICK
Appellants,

v.

HENRY LEWIS McKINNEY and LILLIE MARIE McKINNEY
Appellees.

MEMORANDUM OPINION

Appeal from Jefferson District Court; MICHAEL G. MORONEY, judge. Opinion filed July 30, 1993. Affirmed in part, reversed in part, and remanded with directions.

Richard P. Senecal, of Duncan, Senecal and Bednar, Chartered, of Atchison, for appellants

Jonathan B. Phelps, of Phelps Chartered,

APPENDIX A

of Topeka, for appellee Lillie Marie McKinney.

Henry Lewis McKinney, appellee pro se.

Before GERNON, P.J., BRAZIL, J., and THEODORE B. ICE, District Judge, assigned.

GERNON, J.: Clifford and Patricia Dick appeal a trial court's ruling which limited their recovery following rescission of a real estate contract they had with Henry and Lillie McKinney. The trial court limited the Dicks' recovery to the earnest money paid. The McKinneys cross-appeal, alleging several other errors by the trial court.

The Dicks owned real property in Jefferson County. The McKinneys and the Dicks themselves wrote a contract in April of 1988 for the sale of the Jefferson County real estate to the McKinneys. The 1988 contract

had several contingencies and a handwritten provision. The McKinneys paid the Dicks $2,000 as earnest money. The contingencies were not met, and the sale was never completed.

In January of 1990, the parties wrote a new contract. The new agreement provided that the McKinneys would trade their Lawrence home for the Dicks' home, with the Dicks financing a loan to the McKinneys for the difference. The McKinneys paid the Dicks $4,000 on the day the contract was signed. The $4,000 payment made by the McKinneys is not labeled as earnest money in the 1990 contract, as was the $2,000 in the 1988 contract. We note that the two contracts were written by the parties without the benefit of legal counsel.

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After the abstract of the Dicks' property was delivered to Henry McKinney, he discovered a possible cloud on the title. Apparently the abstract showed that a predecessor in title held a mortgage on the property. The mortgage holder had died, and it was necessary to obtain affidavits of heirship and other proof that the mortgage was paid. All of this was done, and, well before the closing date, Henry McKinney was advised that the Dicks had "good and merchantable title."

The McKinneys, through an attorney, then advised an attorney for the Dicks that they were rescinding the January 1990 contract. The rescission was based on the following: (1) The Dicks fraudulently represented the all-weather accessibility of the property; (2) the January 1990 contract suggested that

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additional agreements needed to be reached between the parties and these had not yet been reduced to writing; (3) the Dicks failed to return the $2,000 the McKinneys paid under the 1988 contract; and (4) existence of clear title had not yet been provided to the satisfaction of the McKinneys.

On March 6, 1990, the Dicks filed suit against the McKinneys, asking the court to order specific performance under the terms of the January 1990 contract or, if the contract could not be enforced, that they be awarded damages for having their property off the market for a considerable time, for the expense of vacating the property to give the McKinneys possession, and for the loss of interest which they had suffered and would continue to suffer. The McKinneys filed a

counterclaim, demanding return of $6,000 (the $2,000 and $4,000) and asking that the 1990 contract be set aside because of fraudulent misrepresentations by the Dicks.

In January of 1991, the Dicks dropped their request for specific performance and elected to proceed on a breach of contract theory. They also asked the court to conclude that the McKinneys had no interest in the property so that it could be sold. The McKinneys raised no objection to the subsequent sale of the property.

Both sides filed numerous motions for summary judgment. On May 17, 1991, the trial court denied both parties summary judgment, finding that material facts remained unresolved.

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In May of 1992, Lillie McKinney, now represented by counsel, filed a motion to dismiss the Dicks' petition and a motion for summary judgment. Henry McKinney, still representing himself, filed a motion to adopt the above motions. The Dicks responded to these motions, but did not file their own summary judgment motion. The McKinneys' motion came on for hearing on June 16, 1992, but no record of these proceedings is provided on appeal.

The trial court granted the McKinneys' motion for summary judgment, but essentially found in favor of the Dicks, allowing them to keep the $6,000. Stating that "[a] party to a contract may properly rescind said contract if the other party materially breaches the contract," the court found that the McKinneys' rescission of the 1990 contract was "invalid

and frivolous," as it was based upon "an imagined lack of marketability." The court did not address the McKinneys' claim of fraudulent misrepresentation regarding access to the property. In addition, the court found the 1988 contract "fell through" as a result of the McKinneys' actions, and, thus, they forfeited the $2,000 in earnest money. Essentially, the trial court tried to put the parties in the same position they were in before entering the 1988 contract.

Both sides filed motions to reconsider, but these were denied by the trial court. The Dicks timely filed notice of appeal, and the McKinneys timely filed notice of cross-appeal. Additional facts will be presented as necessary to discuss the issues on appeal.

The trial court held that the Dicks "shall be entitled to retain the $6,000--Six

APPENDIX A

Thousand Dollars; all fully intended from the inception of the bargaining process, to have been earnest money, and the anticipatory mitigation of damages."

Before reaching the issue of additional damages, two preliminary issues must be addressed.

Early on in the litigation, the Dicks elected to enforce only the 1990 contract. However, the trial court specifically ruled that the Dicks' retention of the $2,000 earnest money under the 1988 contract was proper. The McKinneys argue that such a finding was error where the Dicks had elected to enforce only the 1990 contract. The record clearly reflects that it is the McKinneys who have repeatedly raised this issue, demanding return of the $2,000.

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Our reading of the record leads us to conclude that there is substantial competent evidence to support the trial court's finding that the McKinneys permitted the 1988 contract to fall through, therefore forfeiting the original $2,000 in earnest money. The 1988 contract required the McKinneys "to obtain a commitment for said loan on or before May 1, 1988." Capitol Federal Savings agreed to make the loan to the McKinneys and Henry McKinney assured Clifford Dick, prior to May 1, 1988, that such a commitment had been obtained. The terms of the loan that were written into the 1990 contract were those terms that Henry McKinney had discussed with the bank. Henry McKinney later refused to accept the loan because Capitol Federal insisted on retaining a prepayment penalty in the mortgage. Henry McKinney did not attempt to get a loan from any other area lending source because their

terms were not as favorable as those at Capitol Federal. The McKinneys' argument that they did not receive a commitment from Capitol Federal prior to May 1, 1988, is simply not made in good faith. Under the terms of the contract, when the McKinneys then failed to sell their Lawrence home prior to November 1, 1988, the $2,000 was forfeited to the Dicks.

The other preliminary issue is whether the McKinneys breached the 1990 contract by improperly rescinding the agreement. Again, substantial competent evidence supports this finding by the trial court. Any alleged defect in the merchantability of the title was cured prior to March 1, 1990, and Henry McKinney's refusal to accept the title opinion as true was unreasonable under these circumstances. The McKinneys' additional arguments that the contract required actual physical delivery

of the abstract and that Lillie McKinney had never seen the abstract, contrary to the contract, do not merit consideration and border on the frivolous.

Also, the McKinneys' claim of fraudulent misrepresentation as a basis for rejecting the contract is not supported by the record and was rightfully disregarded by the trial court. Clifford Dick told the McKinneys that the driveway might require blading after snowstorms and that a yearly application of additional gravel would provide traction in the winter. The record is void of any evidence of intent to deceive on the part of the Dicks. The McKinneys have lived within a few miles of the property for many years, had personally viewed the driveway numerous times, and were fully aware that inclement weather can some-

times make even the flattest and fittest of roads impassable.

The 1990 contract does not contain any provision relating to breach by the buyers and does not address the issue of damages. The only such provision relates to default by the sellers: "In the event Sellers are unable or fail to furnish title or possession as agreed in this contract, then, at the option of Buyers, this contract shall be terminated and all monies and considerations paid shall be refunded to Buyers."

After determining that the rescission of the 1990 contract by the McKinneys was improper, the court allowed the Dicks to retain the $4,000 paid by the McKinneys on the date the contract was signed.

The Dicks argue on appeal that, because the McKinneys breached the 1990 contract, they

should not be limited to the $4,000 as damages resulting from the breach. The contract itself is silent as to damages in the event of breach by the buyers. The contract does address the possibility of breach by the buyers should the buyers fail to make the necessary payments on the loan from the sellers, but all of this assumes that the transaction was consummated and that the transfer actually took place, which is not a fact here.

The question thus becomes whether the trial court erred in interpreting the $4,000 payment by the McKinneys as anticipatory mitigated damages or liquidated damages. "'[T]he propriety of liquidated damages is a question of law for the court.'" Kvassay v. Murray, 15 Kan. App. 2d 426, 429, 808 P. 2d 896, rev. denied 248 Kan. 996 (1991). This court's review of conclusions of law is unlim-

ited. Gillespie v. Seymour, 250 Kan. 123, 823 P. 2d 782 (1991).

"'A cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if the intention is consistent with legal principles.'" Hollenbeck v. Household Bank, 250 Kan. 747, 751, 829 P.2d 903 (1992).

As advance payment pursuant to a contractual agreement may serve as liquidated damages if the amount of damages for breach of the contract has been agreed upon in advance, foreclosing any need to prove the actual damages resulting from the breach. See White Lakes Shopping Center, Inc. v. Jefferson Standard Life Ins. Co., 208 Kan. 121, 125, 490 P.2d 609 (1971). However, if the advance payment is determined by the court to be a penalty, a punishment for default, without

regard to actual damages resulting on a breach of the contract, its forfeiture is unenforceable. "In such cases the nondefaulting party is left to a recovery of such actual damages as he can prove." 208 Kan. at 125. See Beck v. Megli, 153 Kan. 721, 726, 114 P.2d 305 (1941); U.S.D. No. 315 v. DeWerff, 6 Kan. App. 2d 77, 78-79, 626 P.2d 1206 (1981).

In determining whether an advance payment is intended as a penalty or as liquidated damages,

> "[t]he instrument must be considered as a whole, and the situation of the parties, the nature of the subject matter and the circumstances surrounding its execution taken into account. There are two considerations which are given special weight in support of a holding that a contractual provision is for liquidated damages rather than a penalty--the first is that the amount stipulated is conscionable, that it is reasonable in view of the value of the subject matter of the contract and of the probable or pre-

> sumptive loss in case of breach; and the second is that the nature of the transaction is such that the amount of actual damage resulting from default would not be easily and readily determinable." Beck, 153 Kan. at 726.

Generally, an advance payment will be considered a penalty where the parties made no attempt to calculate the amount of actual damages that might be sustained in case of breach. "An indication of this lack of calculation is deemed present when the amount of stipulated damages is the same for a total or partial breach, or for breach of minor or major contract provisions." DeWerff, 6 Kan. App. 2d at 80.

We conclude that the $4,000 paid by the McKinneys to the Dicks on the date the 1990 contract was signed was intended solely to secure the McKinneys' performance under the agreement. There is no evidence that the

$4,000 figure was the result of any attempt to calculate the amount of actual damages which could result from a breach of the contract. Moreover, there is nothing in the record to suggest that $4,000 was a reasonable sum or that the actual damages upon the breach by the McKinneys would be difficult to ascertain. Our conclusion is bolstered by examining the 1990 contract as a whole, the situation of the parties, the prior relationship of the parties, the nature of the subject matter, the circumstances surrounding the execution of the contract, and the fact that none of the parties is an attorney. Our reading of the case law suggests that the trial court incorrectly determined that the $4,000 was intended as liquidated damages rather than as a penalty designed to assure the McKinneys' performance under the 1990 contract. The Dicks argue that the case must be remanded to the trial court

so they may present evidence as to the amount of actual damages. We agree and direct that the matter be remanded so the Dicks may be given a full opportunity to present evidence as to the amount of actual damages.

Failure to Grant
McKinney's Summary Judgment Motion

The McKinneys filed a motion for partial summary judgment, asking the trial court to declare the 1988 contract null and void and to order the Dicks to return the $2,000 earnest money. The Dicks had filed a previous motion for partial summary judgment. Both sides then filed responses, motions, and other writings with the court.

The trial judge found, on May 17, 1991, that there remained "material contentions of fact asserted by both parties and material facts controverted by each." The court then

wrote: "The Court, as a matter of law, finds and orders that in the case at bar summary judgment does not lie and that all such motions, both Plaintiffs' and Defendants', should be and are denied." Immediately after this ruling, the McKinneys filed another motion, entitled "Motion for Directed Summary Judgment for Defendants as a Matter of Law." The McKinneys argued in that motion that they were entitled to summary judgment as a matter of law because the Dicks failed to comply with Supreme Court Rule 141 (1992 Kan. Ct. R. Annot. 124). The McKinneys argued that the Dicks failed to file Direct responses to each of the McKinneys' motions and responsive pleadings and therefore, these statements were deemed true. The trial court denied their motion ex parte. The McKinneys renew this argument in their cross-appeal.

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Supreme Court Rule 141 contemplates that, where one party files a motion for summary judgment, should the opposing party fail to file a response listing the controverted facts and conflicting evidence, the opposing party shall be deemed to have admitted the uncontroverted contentions of fact set forth in the memorandum or brief of the moving party. Neither party in the present case complied with Rule 141(a), which requires a moving party to list the uncontroverted facts in an organized fashion. Thus, it is not surprising that the Dicks' responses do not technically comply with Rule 141(b). Both sides improperly listed controverted opinions rather than uncontroverted facts in support of their motions. Requiring the Dicks to respond to each of the McKinneys' statements would be unduly burdensome, in our view, and not within

the spirit of Rule 141. The pleadings in the present case fully apprise the trial court of both sides' positions regarding controverted and uncontroverted facts in a voluminous fashion.

Our review of the various pleadings before the trial court demonstrates that controversy existed regarding the material facts in the case. The trial court, at that stage, properly denied summary judgment.

Failure to Deliver Abstract

This court has referred to this issue earlier in the opinion. However, simply to acknowledge its existence, we will state that we agree with the trial court that the McKinneys' rescission of the 1990 contract was "invalid and frivolous" and based upon "imagined lack of marketability." The McKinneys

contend that the 1990 contract required the Dicks to physically deliver an abstract demonstrating marketable title to both Henry and Lillie McKinney prior to March 1, 1990. They argue that an unencumbered, marketable abstract of title was never delivered to Henry McKinney and that the Dicks, in an attempt to exclude Lillie McKinney from the purchasing process, never furnished her with any abstract of title whatsoever.

Substantial competent evidence supports the trial court's conclusion that the McKinneys' rescission of the 1990 contract, based upon the above recited reasons, was improper. Patricia Dick delivered a copy of the abstract to the McKinneys' home. Henry McKinney identified a possible problem regarding marketability, and the problem was corrected well

APPENDIX A

within the time frames required under the agreement of the parties.

Kansas Consumer Protection Act Claim

In amending their original answer and counterclaim against the Dicks, the McKinneys added a claim that the Dicks had knowingly violated the Kansas Consumer Protection Act, K.S.A. 50-623 et seq. The McKinneys maintained that the Dicks engaged in deceptive practices by failing to truthfully inform them of the problem of access onto the property. This issue was mentioned previously as the driveway issue the McKinneys used as a basis to rescind the contract.

The McKinneys claim that the Dicks failed to respond to this amended pleading and have, therefore, admitted the violation. They point

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to K.S.A. 1992 Supp. 60-208(d), which provides: "Averments in a pleading to which a responsive pleading is required or permitted, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

The Dicks had previously filed an answer to the McKinneys' original counterclaim and expressly stated therein that any and all allegations not admitted were denied. Moreover, the facts used to support the McKinneys' claim under the Kansas Consumer Protection Act were the same facts alleged in their original counterclaim, which were denied by the Dicks. We find no merit to this argument.

It is elementary that the Dicks cannot be characterized as "suppliers" under the Kansas Consumer Protect Act. "'Supplier' means a

APPENDIX A

manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer." (Emphasis added.) K.S.A. 1992 Supp. 50-624(i). Therefore, the Act cannot be applied to them.

The McKinneys' Damages

The McKinneys argue that the facts of this case require that they be awarded damages for several reasons: (1) The Dicks illegally converted the $6,000 paid under the two contracts; (2) the Dicks breached the 1990 contract by ignoring the sole remedy available to them; (3) the Dicks violated the Kansas Real Estate Brokers' and Salespersons' Act, K.S.A. 58-3034 et seq.; and (4) the Dicks

violated the Kansas Consumer Protection Act.

Although most of the issues raised by the Dicks here have been discussed previously, the issue concerning the Kansas Real Estate Brokers' and Salespersons' Act deserves comment.

The McKinneys argued below that, based upon the Dicks' "extensive real estate holdings and experience," the Dicks "level of responsibility should therefore be controlled by the Kansas Real Estate Brokers and Salesman Act." Other than that conclusory statement, the McKinneys provide no legal basis to bring the Dicks within the scope of the Act. They provide no reference to the specific statute or subsection thereof which the Dicks allegedly violated.

We need not repeat the arguments concerning the other reasons given to support a claim

for damages by the McKinneys, as we have dealt with them above. The trial court did not err in denying the McKinneys recovery for damages.

Punitive Damages

Finally, the McKinneys argue that they were entitled to punitive damages because the Dicks wrongly converted the $6,000 and made fraudulent misrepresentations to them about the access to the property.

"In Kansas, punitive damages are awarded to punish the wrongdoer for his malicious, vindictive, or willful and wanton invasion of another's rights, with the ultimate purpose being to restrain and deter others from the commission of similar wrongs.." Folks v. Kansas Power & Light Co., 243 Kan. 57, 72, 755 P.2d 1319 (1988).

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We find nothing here to justify punitive damages against the Dicks and, therefore, agree with the trial court.

Affirmed in part, reversed in part, and remanded with directions for the trial court to allow the Dicks to present evidence as to the actual damages they experienced as a result of the McKinneys' breach.

APPENDIX B

SUPREME COURT ORDER DISTRICT CASE NO. 90C10

IN THE SUPREME COURT

OF THE STATE OF KANSAS

HENRY LEWIS MCKINNEY
1230 W 28TH COURT
LAWRENCE KS 66046

PRO SE

CLIFFORD L. DICK AND PATRICIA A. DICK, APPELLANTS,
V
HENRY LEWIS MCKINNEY AND
LILLIE MARIE MCKINNEY

NO. 92-68581-AS

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY APPELLEE, HENRY MCKINNEY. CONSIDERED BY THE COURT AND DENIED.

DATE: 09/28/93.

CAROL G. GREEN
CLERK

APPENDIX C

DISTRICT COURT OF KANSAS
CHAMBERS OF COURTHOUSE
MICHAEL G. MORONEY KANSAS CITY, KANSAS
WYANDOTTE COUNTY

August 13, 1992

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Lawrence, Kansas 66046

RE: **CLIFFORD L. DICK AND PATRICIA A. DICK vs. HENRY LEWIS MCKINNEY AND LILLIE MARIE MCKINNEY**
CASE NO. 90-C-10

To All Parties:

I consider the lawsuit at an end. There will be no trial.

Very sincerely,
/S/
Michael G. Moroney
Judge of the District Court
Division Thirteen
29th Judicial District

MGM/ara

APPENDIX D

CHARACTERISTIC ERRORS BY THE COURT OF APPEALS' OPINION OF 7/30/93

1. "The record is void of any evidence of intent to deceive on the part of the Dicks." App. A, p. 54. This is a characteristic blatant lie. The Dicks lied continuously from the filing of the initial petition to the Court of Appeals' oral presentation. See Record, II, 394-528. ("Who's Telling the Truth?")

2. The entire discussion of the 1988 contract is mostly false. App. A, pp. 51-52. See Mr. McKinney, Petition for Review, pp. 3-8, which discusses the falsehoods one by one.

3. The Court of Appeals admits that the Dicks were technically guilty of ignoring Kansas Supreme Court Rule 141(b) law but they say it was okay not to answer because complying would be too "burdensome"! Or, that court claims that the McKinneys did not follow the

rule either! (This unsupported, newly brought up contention is false also.) Therefore, it was okay for the Dicks not to answer? The Dicks filed the suit; how can it be too burdensome for them to prove their false claims?

None of this discussion is relevant, fair or impartial. The 1988 contract issue was conceded by the trial court in awarding summary judgment. The Court of Appeals intentionally misunderstands Rule 141 (b) and its consequences.

4. K.S.A. 60-208(d). The Court of Appeals claims that the Dicks did not need to answer the McKinneys' amended petition because of actions supposedly occurring the previous year. Perhaps that explains why they did not need to answer discovery or follow standard procedures on a host of things, like signing alleged motions for summary judgment. The Court of Appeals' ridiculous argument is

biased, prejudiced and without merit. App. A, pp. 65-66.

5. ". . . .Henry McKinney assured Clifford L. Dick, prior to May 1, 1988, that such a [mortgage] commitment had been obtained." App. A, p 51. It was shown in deposition that Mr. Dick perjured himself when he made this claim, which could not have happened. See Mr. McKinney, Petition for Review [to the Kansas Supreme Court], p. 6. This is some of the false "evidence" the Court of Appeals has adopted.

6. The Court of Appeals states that the abstract problem was taken care of well before March 1, 1990. There is no citation to law to support this false assumption. The Dicks' attorney conducted probate by telephone. He was not a probate judge and neither he nor his clients then furnished good abstract of title to the McKinneys, nor did they furnish any

proof of good title. The Court of Appeals seems to be unfamiliar with probate proceedings or the Record. App. A, p. 45.

7. Mr. Dick gave no warnings about the access before the lawsuit was filed and there is no proof in the Record that he did. His repeated statement was "there's never a problem with the access." This was heard by many witnesses. This entire subject has been gone over and over and it was not on appeal.

8. The entire discussion of "damages" is wrong, self-contradictory, and without merit. By not answering motions for summary judgment, the Dicks conceded the damages issue in February 1991, and they had no ground to stand on. See Mrs. McKinney, "damages" in Petition for Review, pp. 11-13, App. A, pp. 54ff.

9. The KCPA matter reflects the Court of Appeals' approach to this case: lie when cornered. Anyone can see that KCPA applies

to Dick v. McKinney. The Record proves it; KCPA proves it as well. App. A, pp. 65-66.

10. The McKinneys' amended petition of February 1, 1991 (Record, II, 330-335) contained new contentions to add to their original pleadings. The Court of Appeals provides no citations to prove otherwise. The reader of this petition should ask why the McKinneys would wish to waste time repeating their original petition. The KCPA was a new point as was KREBSA. App. A, p. 66.

11. ". . . without the benefit of legal counsel". This is false that the litigants were without legal counsel. The Dicks saw James F. Swoyer, Jr. on a regular basis; the McKinneys consulted the family attorneys on a regular basis also as established in depositions. App. A, p. 44.

APPENDIX D

12. "Essentially, the trial court tried to put the parties in the same position they were in before entering the 1988 contract." App. A, p. 49. The McKinneys are $6,000 poorer plus huge expenses for legal bills because of the Dicks' actions. "Same position"? Ridiculous! Furthermore, the damage to Mr. McKinney's health has been enormous.

Supreme Court, U.S.
FILED
FEB 25 1994
OFFICE OF THE CLERK

No. 93-1208

In The

Supreme Court of the United States

October Term, 1993

HENRY LEWIS MCKINNEY
and LILLIE MARIE MCKINNEY,

Petitioners,

v.

CLIFFORD L. DICK
and PATRICIA A. DICK,

Respondents.

On Petition For Writ Of Certiorari
To The Kansas Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-1208

In The

Supreme Court of the United States

October Term, 1993

HENRY LEWIS MCKINNEY
and LILLIE MARIE MCKINNEY,

Petitioners,

v.

CLIFFORD L. DICK
and PATRICIA A. DICK,

Respondents.

On Petition For Writ Of Certiorari
To The Kansas Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE RESPONDENTS, CLIFFORD L. DICK and PATRICIA A. DICK, appearing by counsel. RICHARD P. SENECAL of DUNCAN, SENECAL, BEDNAR AND ASHER, CHARTERED, hereby enter their opposition to the Petition of Henry Lewis McKinney and Lillie Marie McKinney, proceeding pro se, for Writ of Certiorari to review the Kansas Court of Appeals' Opinion filed on July 30, 1993, case number 68,581, and the review of said decision denied by the Kansas Supreme Court on September 28, 1993.

OPINIONS BELOW

The Respondents adopt and incorporate by reference herein those opinions designated by the Petitioners in the Petition for Writ of Certiorari as filed, and in addition refer the Court to the decision of the Honorable Michael G. Moroney in the District Court of Jefferson County, Kansas, which is attached hereto and designated as **APPENDIX A.**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rules of the Supreme Court of the United States, contained at 28 U.S.C.A.

Rule 10.1(c). A review on writ of certiorari is not a matter of right, but judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered: (c) when a state court or United States Court of Appeal has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 14.1(f). The petition for a writ of certiorari shall contain, in the order here indicated: (f) Constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor. If the provisions

involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix referred to in subsection .1(k) of this rule.

Rule 14.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

Kansas Statutes.

Supreme Court Rule 141. No motion for summary judgment shall be heard or deemed finally submitted for decision until: (a) The moving party has filed with the Court and served on opposing counsel a memorandum or brief setting forth concisely in separately numbered paragraphs the uncontroverted contentions of fact relied upon by said movant (with the precise references to pages, lines and/or paragraphs of transcripts, depositions, interrogatories, admissions, affidavits, exhibits or other supporting documents contained in the court file and otherwise included in the record): and (b) Any party opposing said motion has filed and served on the moving party within 21 days thereafter, unless the time is extended by court order, a memorandum or brief setting forth in separately numbered paragraphs (corresponding to the numbered paragraphs of movant's memorandum or brief) a statement whether each factual contention of movant is controverted, and if controverted, a concise summary of conflicting testimony or evidence, and any additional genuine issues of material fact which preclude summary judgment (with precise references as required in paragraph [a], supra).

A motion may be deemed submitted by order of the court upon expiration of 21 days, or expiration of the court ordered extended period, after filing and service on opposing counsel of the brief or memorandum of moving party notwithstanding the failure of the opposing party to comply with paragraph (b) supra. In such cases the opposing party shall be deemed to have admitted the uncontroverted contentions of fact set forth in the memorandum or brief of moving party. In determining a motion for summary judgment the Judge shall state the controlling facts and legal principles controlling the decision in accordance with Rule 165.

STATEMENT OF THE CASE

This action arose out of a contract for deed. Over a period of approximately two years, two separate contracts were signed. On April 13, 1988, the Petitioners, Henry Lewis McKinney, and his wife, Lillie Marie McKinney, entered into a contract for deed with the Respondents, Clifford L. Dick and Patricia A. Dick. (R. Vol. I. Exhibit A.) Pursuant to the terms of the contract, the Petitioners paid to the Respondents $2,000.00, which sum was designated as earnest money. (R. Vol. I, Exhibit A.) The 1988 contract failed as a result of Petitioners' inability to obtain satisfactory financing from Capitol Federal Savings.

The Petitioners and Respondents then entered into a second contract dated January 20, 1990. (R. Vol. I, Exhibit B.) Pursuant to the terms of said contract, the Petitioners paid an additional $4,000.00 to the Respondents. (R. Vol.

I, Exhibit B.) The contract further designated a closing date of March 1, 1990. (R. Vol. I, Exhibit B.) Paragraph 18 of the contract further stated: "that Sellers and Buyers will furnish each other with abstracts of title to the above-described parcels of real estate certified to date showing merchantable title to said real estate, subject only to the exceptions herein set forth, if any. Buyers and Sellers shall then have a reasonable time to examine the same and make requirements in writing necessary to pass merchantable title as provided herein. In the event any requirements are made, Sellers and Buyers shall have a reasonable time to correct said requirements needed to pass merchantable title. Buyers will deliver to Sellers the abstract of title and deed to their property on or before February 10, 1990."

On or about February 16, 1990, the Petitioners notified the Respondents of their intention to rescind the January 20, 1990, contract. The stated basis for said recision was the fraudulent misrepresentation of the accessibility of the driveway. (R. Vol. I, pages 68-73.) On February 23, 1990, Petitioners' attorney also demanded a return of the earnest money and a return of the deed and again stated Petitioners' attempt to rescind the contract. The stated reason for said recision was Respondents' failure to furnish an abstract showing merchantable title and fraudulent misrepresentation of the driveway access. (R. Vol. I, pages 39-67; Exhibit G.)

On the 19th day of February, 1990, the Petitioners notified Respondents' attorney that the previous request for a title opinion could not be completed and requesting a return of their deed. (R. Vol. I, pages 39-67; Exhibit F.)

The Respondents filed suit in the District Court of Jefferson County, Kansas, on or about the 6th day of March, 1990. An amended petition was filed on the 19th day of April, 1990. Respondents' amended petition requested specific performance of the contract entered into on or about the 20th day of January, 1990, or in the event the Petitioners were not able to consummate the contract or any part thereof, that the Respondents be awarded damages for having had their property off the market for a considerable time, the expense of vacating the property to give Petitioners possession, and the loss of interest which they have or will have suffered, and such other and further relief as the Court would deem just and equitable. (R. Vol. I, pages 3-4; 39-67.)

On or about February 1, 1991, the Petitioners filed a motion for partial summary judgment. Petitioners requested that summary judgment be granted on the issue of the sale of Respondents' real estate near Perry, Kansas, and the cancellation for cause of the contract of April 13, 1988. The motion was accompanied by a memorandum containing both allegations of fact and arguments intermixed and no citations of law. (R. Vol. I, pages 243-244; 247-324.) The Petitioners requested that a hearing be held on the motion for partial summary judgment on February 21, 1991, at 9:30 a.m. (R. Vol. II, page 327.) On January 18, 1991, Respondents filed a motion for partial summary judgment on the issue of Petitioners' interest in the contested real estate and further announced therein that Respondents intended to exercise a remedy in breach of contract only. (R. Vol. I, pages

238-240.) Respondents also filed a motion for partial summary judgment on the issue of recision. (R. Vol. II, pages 337-342.)

Both the Petitioners' and the Respondents' motions for summary judgment were heard pursuant to Petitioners' notice of hearing on February 2., 1991. A memorandum decision on all motions for summary judgment was filed by the Court on May 17, 1991. All motions for summary judgment were denied. (R. Vol. III, pages 721-722.)

After the voluntary recusal of the original Judge sitting in the District Court of Jefferson County, Kansas, and the appointment of a successor Judge, the Petitioners again filed a motion to dismiss and motion for summary judgment. (R. Vol. III, pages 770-792.) A motion for summary judgment and motion to adopt Lillie Marie McKinney's motion to dismiss and motion for summary judgment was also filed. (R. Vol. III, pages 845-860.) Respondents responded to the motion of Lillie Marie McKinney to dismiss and for summary judgment, as well as Henry Lewis McKinney's motion for summary judgment and motion to adopt Lillie Marie McKinney's motion to dismiss and for summary judgment, but did not file competing motions. (R. Vol. III, pages 828-844; 875-891.)

ARGUMENTS

FIRST ARGUMENT: THE KANSAS COURT OF APPEALS APPROPRIATELY CHARACTERIZED THE RULING OF THE TRIAL COURT ON THE PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND NEITHER THE COURT OF APPEALS' CHARACTERIZATION OF SAID DECISION NOR ITS DECISION UPHOLDING THE TRIAL COURT'S DECISION DENYING THE PETITIONERS THE RETURN OF THEIR EARNEST MONIES AND REMANDING THE CASE FOR FURTHER PROCEEDINGS TO ALLOW THE RESPONDENTS TO PRESENT EVIDENCE AS TO DAMAGES CONSTITUTED A DENIAL OF THE PETITIONERS' DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment guarantees only that all persons are to be treated equally under the same conditions in like circumstances in the redress of wrongs and enforcement of modes of procedure. *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254 (U.S. Ariz. 1921); *Hoffman v. U.S.*, 767 F.2d 1431 (C.A. 9 1985). The due process clause guarantees a party an opportunity to present his case and have the merits of such case fairly judged. *Jackson Water Works, Inc. v. Public Utilities Commission of the State of California*, 793 F.2d 1090, *Certiorari denied* 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 184 (C.A. 9 1986). To establish a claim of equal protection or due process, the Petitioners must show that they possess a property or liberty interest which is protected, and then they must show a deprivation of that interest by the State. *American Federation of Government Employees, AFL-CIO v. U.S.*, 622 F.Supp. 1109, *Affirmed* 780 F.2d 720 (D.C. Ga. 1984).

The Petitioners, as the basis for their Petition for Writ of Certiorari, allege that they were denied due process and equal protection under the Fourteenth Amendment by a misrepresentation by the Kansas Court of Appeals of the trial court's decision of summary judgment. However, nowhere in the Petitioners' argument do they provide this Court with support for the contention that such a misrepresentation constitutes a denial of due process or equal protection or that a misrepresentation actually occurred. The Petitioners in essence assert that they presented facts contrary to the Court's decision and provide citations to the record where said facts were presented. Only once do the Petitioners assert that said representations were uncontroverted.

It is incumbent upon the Petitioners to clearly identify in the Petition for Writ of Certiorari those issues which warrant review by this Court and to provide support for the same. A mere allegation, although lengthy, that the trial court and Court of Appeals have wrongly viewed the facts, where such views do not involve an important question of federal laws, does not in and of itself warrant review.

It has previously been determined on several occasions that the Fourteenth Amendment, in guaranteeing equal protection of laws, does not assure uniformity of judicial decisions or immunity from judicial error. *J.H. Bauman v. Smrha*, 145 F. Supp. 617, D.Kan., *Affirmed* 352 U.S. 863, 77 S.Ct. 96, 1 L.Ed. 73 (1956); *Milwaukee Electric R. and Light Company v. State of Wisconsin, ex. rel. City of Milwaukee*, 252 U.S. 100, 40 S.Ct. 306, 64 L.Ed. 976 (U.S. Wis. 1920). Thus, it is not sufficient merely to state that the decision of the Court of Appeals might be viewed as

wrong, rather it must be shown that there was an intentional attempt on the part of the Court to disregard the law as applied to the Petitioners. The Respondents would assert that not only have the Petitioners completely failed to meet this requirement, but in addition such would be a difficult task, inasmuch as the rights of parties surrounding a summary judgment are very much within the discretion of the Court. See *Ruebke v. Globe Communications Corp.*, 738 P.2d 1246, 241 Kan. 595 (1987). The fact that one loses his case does not in and of itself show a denial of equal protection of the laws. *Sexton v. Berry*, 233 F.2d 220, *Certiorari denied* 352 U.S. 870, 77 S.Ct. 84, 1 L.Ed. 2d 76 (U.S. Ohio 1956). Further, it is incumbent upon the Petitioners to show discriminatory intent unless there is created an overtly discriminated class. *Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328 (C.D. Cal. 1989).

Within their argument, the Petitioners also seems to allege a violation of their right to equal protection and due process based upon an alleged deviation of the trial court from the procedural requirements of summary judgment and the Court of Appeals' upholding of the same. It should be noted that a violation of an individual's right to procedural due process or equal protection cannot be shown merely by establishing that a State (or in this instance a court) has deviated from its own established procedures. *Brandon v. District of Columbia Board of Parole*, 823 F.2d 644 (C.A.D.C. 1987). Again, it must be shown that the deviation was as a result of an intent to discriminate.

The decision of the Court of Appeals indicates that it did in fact carefully review the record and further indicates that a rational and factual basis for its decision exists. That the decision of the trial court and the Court of Appeals is different than that anticipated by the Petitioners or that which the Petitioners can accept as fair does not establish that a violation of their right to equal protection or due process has occurred.

SECOND ARGUMENT: THE PETITIONERS HAVE FAILED TO ASSERT FACTS UPON WHICH THIS COURT COULD CONCLUDE THAT THE KANSAS COURT OF APPEALS HAS INTENTIONALLY MISREPRESENTED THE KANSAS CONSUMER PROTECTION ACT, *K.S.A. 58-30*, AS IT APPLIES TO *DICK V. MCKINNEY*, AND AS SUCH HAVE FURTHER FAILED TO DESIGNATE HOW THE DECISION OF THE COURT REGARDING THE KANSAS CONSUMER PROTECTION ACT VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS AND/OR EQUAL PROTECTION UNDER THE LAW.

The Petitioners assert that the Kansas Court of Appeals violated their right to due process and equal protection under the law in affirming the trial court's dismissal of the Petitioners' claim under the Kansas Consumer Protection Act. First, the Respondents would note that although the Petitioners state that evidence from the record establishes the applicability of the Kansas Consumer Protection Act, the Petitioners fail to specify such evidence. In addition, the Petitioners further fail to designate or identify any portion of K.S.A. 60-208(d) in support of their allegation that the Respondents failed to respond as procedurally required or that the Appellate

Court's ruling upon such procedures was, as the Petitioners assert, "an intellectually bankrupt contention".

The rules of the Supreme Court regarding a Petition for Writ of Certiorari require that the Petitioners set forth any statutes, ordinances, or regulations involved in the case. The rules further state that the failure of the Petitioners to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying the petition. The Petitioners have altogether failed to provide this Court with adequate information under which it might judge whether the trial court in the first instance and the Court of Appeals in the second instance appropriately denied Petitioners' claim under the Kansas Consumer Protection Act or the procedures required by K.S.A. 60-208(d).

Also, as stated in previous argument, it is incumbent upon the Petitioners to specify not only the existence of a constitutionally protected interest, but the manner in which the Kansas Court of Appeals or trial court deprived the Petitioners of their right to due process of law or equal protection. *American Federation of Government Employees, AFL-CIO v. U.S.*, 622 F.Supp. 1109 (D.C. Ga. 1984), *Affirmed* 780 F.2d 720 (1986). A mere allegation that the Court's decision was in error in not sufficient. *Valtaskis v. C.I.R.*, 801 F.2d 622 (C.A. 2 1986).

THIRD ARGUMENT: THE PETITIONERS FAIL TO SPECIFY THE MANNER IN WHICH THE KANSAS COURT OF APPEALS' RULING ON "DAMAGES" CONSTITUTED A REWRITING OF THE 1988 AND 1990 CONTRACTS OR THE DECISION OF THE TRIAL COURT AND THEREBY CONSTITUTED A DENIAL OF THE PETITIONERS' FOURTEENTH AMENDMENT RIGHTS OF EQUAL PROTECTION.

The Petitioners argue that in remanding the Respondents' claim to the District Court for further hearing upon the issue of damages the Kansas Court of Appeals rewrote the 1988 and 1990 contracts. The Petitioners then argue that such a decision was erroneous and subjected the Petitioners to damages after they had been awarded summary judgment. In their argument, the Petitioners again fail to specify or provide support for the conclusion that such an action constituted a denial of Petitioners' right to equal protection other than to assert that the Court of Appeals and trial court were in error.

Further, in asserting that the trial court and Court of Appeals were in error, the Petitioners make several statements which are clearly misstatements of the record. First, the Petitioners assert that they were awarded "essentially unrestricted summary judgment", or in other terms "broad based summary judgment". The Respondents would assert that the award of summary judgment to the Petitioners was everything but essentially unrestricted and, further, that the term "broad based" can be found nowhere in either the decision of the trial court or the Court of Appeals but is an invention of the Petitioners. A careful reading of the trial court's decision, as well as the carefully reasoned decision of the Court of

Appeals, supports the conclusion of the Court of Appeals.

Petitioners also state that the trial court let stand Petitioners' argument that fraudulent misrepresentation of Respondents' access road justified recision. However, a reading of the decision of the trial court leads to the opposite conclusion.

The decision of the Court of Appeals as to "damages" was based upon the Respondents' appeal of the trial court's limitation of those damages based upon a characterization of the monies paid under the 1988 and 1990 contracts as anticipatory mitigation of damages. The issue was fully briefed by the Respondents and a responsive brief was filed by the Petitioners. The decision of the Court of Appeals is supported by both the information presented by the Petitioners and Respondents and the decision of the trial court when viewed in context of the Court's statement that Petitioners were granted summary judgment to the extent that it comported with the other rulings set forth within the trial Court's memorandum decision.

The Petitioners fail to provide any basis for their statement that the Kansas Supreme Court did not review the Court of Appeals' decision closely, or the trial court's opinion, or the record; they further provide no basis for the underlying assumption that had it done so, a different result would have been had or that absent an opposing result, the Petitioners have suffered a violation of their constitutional rights.

FOURTH ARGUMENT: THERE HAS BEEN NO DENIAL OF THE RIGHT OF EQUAL PROTECTION BY THE COURT OF APPEALS OR THE TRIAL COURT REGARDING MR. MCKINNEY'S MENTAL CONDITION WHEN THE 1990 CONTRACT WAS SIGNED.

As a final issue, the Petitioners propose that their right to equal protection has been somehow violated by the court's apparent refusal to excuse Mr. McKinney from the obligation of the contract due to his physical and/or mental condition. In support, Mr. McKinney states that extensive medical testimony has been introduced in the record that Mr. McKinney was mentally unable because of complications related to severe kidney failure to conclude any contracts whatsoever. Respondents would, however, take issue with Mr. McKinney's characterization of the medical evidence introduced as being testimony and, further, that any evidence introduced stated that he was mentally unable to conclude any contract whatsoever. In fact, Mr. McKinney's actions would belie this assertion and provide adequate support for the actions of the trial court and the Court of Appeals. The facts asserted by the Petitioners within this Petition for Writ of Certiorari and the course of this action indicate that Mr. McKinney acted as his own advisor and that of his wife over the course of the writing of the contract and in attempting to rescind the contract over abstract and fraud matters. Further, Mr. McKinney has acted as his own counsel throughout the course of this action, although he asserts that his health continues to worsen.

Lastly, under Kansas law a spouse has the ability to bind themselves to contracts separate and apart from their respective spouse. Therefore, any incompetence on

the part of Mr. McKinney would not excuse his wife, Lillie Marie McKinney. More importantly, however, Mr. McKinney again fails to show any violation of his right to equal protection as it relates to this issue. He has shown no intent to discriminate, nor has he given any legal basis whatsoever for asserting that the Courts' actions herein actually constitute or have resulted in a violation of his right to equal protection or due process.

CONCLUSION

Respondents respectfully request that the Supreme Court of the United States reject the Petition for Writ of Certiorari of Henry Lewis McKinney, and Willie Marie McKinney as it is without foundation in law or equity. Petitioners have provided no basis for their assertion that the Kansas Court of Appeals or the District Court of Jefferson County, Kansas, in the first instance has acted in a manner with the intent of or even the effect of violating the Petitioners' right to due process or equal protection of the law.

DATED this 25 day of February, 1994.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF JEFFERSON COUNTY KANSAS

CLIFFORD L. DICK AND PATRICIA A. DICK Plaintiffs, vs. HENRY LEWIS MCKINNEY AND LILLIE MARIE MCKINNEY Defendants.	)	Case No. 90-C-10

JOURNAL ENTRY AND MEMORANDUM DECISION

Now on this 16th day of June, 1992, comes on for hearing, the Defendant's Motion to Dismiss and Motion for Summary Judgment. The Court allows Defendant Henry L. McKinney to file, this date, his motion for summary judgment and plaintiffs have until July 2, 1992, to respond by memorandum brief. The plaintiff, having fully responded to all defendant's motions, and the Court having reviewed the file, the relevant case law, and being duly advised in the premises does make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. All the parties are lawful residents of the State of Kansas.

2. That plaintiffs are lawful residents of Jefferson County, Kansas, and the defendants are lawful residents of Douglas County, Kansas.

3. That the parties entered into a contract to convey realty on January 20, 1990.

4. That, pursuant to the contract of January 20, 1990, defendants tendered to plaintiff's earnest money, in the amount of $4000.00; which plaintiff's still hold.

5. That defendants gave notice of their intent to rescind the contract of January 20, 1990, on either February 16, 1990, or by letter of their attorney on February 23, 1990.

6. That plaintiff's have, since the alleged default of the contract by defendant's, sold the property in question.

7. That paragraph 22 of the contract of sale recites that time is of the essence.

8. That on the day for closing on the agreement, the defendant's had already taken action to notify plaintiff's of their intent not to close.

9. That the 1988 contract was effectively defaulted upon by defendant's [sic]; evidenced by the parties' having entered into the new January, 1990 contract.

10. That the plaintiff's still hold the $2000.00 earnest money pursuant to the 1988 contract.

11. That the above represents all material facts in this action.

APPLICABLE CASE LAW

1. Summary Judgment is appropriate where there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. *Patterson v. Brouhard,* 246 Kan. 700, 702.

2. If factual issues do exist, they must be material to the case to preclude summary judgment. *Reubke v. Globe Communications Corp.,* 241 Kan. 595 (1987).

3. "The summary judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue *as to any material fact* and that the moving party is entitled to judgment *as a matter of law."* K.S.A. 60-256. *Bacon v. Mercy Hospital of Ft. Scott,* 243 Kan. 303 at 306 (1988).

4. "A fact is material if it is one to which a reasonable person would attach importance in determining his choice of action in the transaction involved." *Timi v. Prescott State Bank,* 220 Kan. 377 (1976).

5. *Nordstrom v. Miller,* 227 Kan. 59 (1980) has some telling comments on this point (at p. 65):

"The witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be narrated exactly and in order; the testimony must be clear direct and weighty; the witnesses must be lacking in confusion as to the facts at issue." *Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.,* 226 Kan. 70, 78, 596 P. 2d 816 (1979). *Gonzalez v. Allstate Ins. Co.,* 217 Kan. 262, Syl. Par. 1; *In re Estate of Shirk,* 194 Kan. 424, Syl. 2, 399 P. 2d 850, *rehearing denied* 194 Kan. 671, 401 P. 2d 279 (1915).

6. A party to a contract may properly rescind said contract if the other party materially breaches the contract.

7. Defendants frivolously rescinded the January 20, 1990 contract because of an imagined lack of marketability of Plaintiffs' abstract of title as of February 13, 1990, and before March 1, 1990. The rescission was invalid and frivolous.

8. The Court finds that it is uncontroverted, admitted by both sides, that the original contract fell through, that the proposed sale of the subject realty could not be consummated and that it was defendants' [sic] who permitted this, thus forfeiting the original $2000.00 – Two Thousand Dollars in earnest money.

9. There can be no doubt in the mind of anyone, lawyer, layman, or judge, that this type of eventuality was precisely why earnest money was tendered.

Hence, the plaintiffs herein, shall keep the aforementioned earnest money as agreed, just compensation for having had their realty off the open market temporarily and anticipatory mitigated damages.

10. The parties, still interested in finalizing a lawful transfer of this realty, renewed negotiations and once again, executed an agreement, this time incorporating a tender of $4000.00 – as earnest money.

11. Defendants refused to follow through with the necessary final steps to finalize the transfer of the subject realty.

12. It is this Court's belief that this operated as a lawful forfeiture of the second earnest money, the $4000.00, Four Thousand Dollars – aforementioned.

13. Therefore, the Court finds that plaintiffs shall be entitled to retain the $6000.00 – Six Thousand Dollars; all fully intended from the inception of the bargaining process, to have been earnest money, and anticipatory mitigation of damages.

14. The Court chooses not to comment upon what the court file appears to reflect; an inordinately endless series of motions and superfluous requests. Therefore, the costs incurred by the parties shall be born [sic] by the parties so experienced them.

15. The Motion for Summary Judgment is granted, insomuch as it comports with the above mentioned rulings.

BE IT SO ORDERED.

I hereby certify the above and foregoing
to be a true and correct copy, the original
of which is filed and entered on record in
this court on July 13, 1992 .
EVELYN A. TAYLOR
JEFFERSON CO KANSAS

Dated July 13, 1992

By Evelyn A. Taylor

/s/ M G Moroney
HONORABLE
MICHAEL G. MORONEY
Judge of the District Court
Division Thirteen
29th Judicial District

(3)

Supreme Court, U.S.
FILED
MAR 14 1994
OFFICE OF THE CLERK

No. 93-1208

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

HENRY LEWIS MCKINNEY
and LILLIE MARIE MCKINNEY
Petitioners,

v.

CLIFFORD L. DICK
and PATRICIA A. DICK
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE KANSAS SUPREME COURT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTORY PROVISIONS INVOLVED

"*KANSAS SUPREME COURT RULE 141.*

No motion for summary judgment shall be heard or deemed finally submitted for decision until:

(a) The moving party has filed with the court and served on opposing counsel a memorandum or brief setting forth concisely in separately numbered paragraphs the uncontroverted contentions of fact relied upon by said movant (with precise references to pages, lines and/or paragraphs of transcripts, depositions, interrogatories, admissions, affidavits, exhibits, or other supporting documents contained in the court file and otherwise included in the record); and

(b) Any party opposing said motion has filed and served on the moving party within twenty-one (21) days thereafter, unless the time is extended by court order, a

memorandum or brief setting forth in separately numbered paragraphs (corresponding to the numbered paragraphs of movant's memorandum or brief) a statement whether each factual contention of movant is controverted, and if controverted, a concise summary of conflicting testimony or evidence, and any additional genuine issues of material fact which preclude summary judgment (with precise references as required in paragraph [a], *supra*).

The motion may be deemed submitted by order of the court upon expiration of twenty one (21) days, or expiration of the court ordered extended period, after filing and service on opposing counsel of the brief or memorandum of moving party notwithstanding the failure of the opposing party to comply with paragraph (b), *supra*. In such cases the opposing party shall be deemed to have admitted the uncontroverted contentions of fact set forth in the

memorandum or brief of moving party. In determining a motion for summary judgment the judge shall state the controlling facts and the legal principles controlling the decision in accordance with Rule 165."

[Rule 141(b) quoted verbatim except for last sentence in Appellees' Brief of Cross Appeal (to the Kansas Court of Appeals), pp. 15-16]

KANSAS STATUTES ANNOTATED (K.S.A.) 60-208(d)

"Effect of failure to deny. Averment in a pleading to which a responsive pleading is required or permitted, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." [Essential part quoted verbatim in Appellees' Brief of Cross Appeal, p. 20. The required time for response is within 20 to 41 days. K.S.A. 60-215(a).]

JURISDICTION

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. Section 1257(3).

CORRECTIONS OF TECHNICAL ERRORS IN *Petition for Writ of Certiorari*

Table of Authorities. Constitution, Statutes, and Regulations Cited. p. vi: 28 U.S.C. Section 1254(1) should read 28 U.S.C. Section 1257(3).

III. **JURISDICTION**. (2), p. 2. Same change as immediately above.

No. 93-1208

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term 1993

HENRY LEWIS MCKINNEY
and LILLIE MARIE MCKINNEY
Petitioners,

v.

CLIFFORD L. DICK
and PATRICIA A. DICK

PETITION FOR A WRIT OF CERTIORARI TO
THE KANSAS SUPREME COURT

**REPLY TO RESPONDENTS' BRIEF
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

The Petitioners, Henry Lewis McKinney and Lillie Marie McKinney, herewith reply to Respondents' new arguments, errors and omissions contained in Respondents' *Brief in Opposition*. Petitioners hereby incorporate by reference their *Petition for Writ of Certiorari*.

Statement of the Case: Page 6, PAR. 2, LINES 6-7. Respondents' untimely opinions provide no statutory or other evidence that Respondents' contentions have any legal weight. The Court of Appeals ruled that the Respondents "technically" violated Ks. Sup. Ct. Rule 141. Under *Federal Rules of Civil Procedure*, Rule 56(e), and *Rules and Practice and Procedure of the United States District Court, District of Kansas*, Rule 206(c) and especially (g): "If a respondent fails to file within the time required by this rule, the motion will be considered and decided as an uncontested motion and ordinarily will be granted without further notice."

Statement of the Case: Page 6, 5 lines from bottom. Respondents did not move the trial court or the Petitioners to amend their pleadings, and therefore they failed to establish "a remedy in a breach of contract only."

In effect, Respondents had no remedies whatsoever, since damages were not contractually allowed, they did not mitigate their damages for many months, and specific performance was impossible with the sale of the Dicks' real estate.

Statement of the Case: Page 7, par. 1. Respondents fail to admit to this Court that in their first two purported motions for summary judgment, they did not comply with Rule 141(a) (they listed a few unsupported opinions instead of material facts) and the third motion was **NOT** even signed, which was grounds to strike it: Petitioners filed a Motion to Strike with that court, but Judge Nafziger ignored due process by failing to rule on it.

Statement of the Case: Page 7, par. 2. Respondents had, in effect, no viable motions for summary judgment. Moreover, Petitioners had numerous motions for summary judgment,

virtually all of which Respondents have intentionally overlooked.

Statement of the Case: Page 7, bottom, last two lines. Respondents' statement "a title opinion could not be completed" is in error.

ARGUMENTS

First Argument: Page 8, par. 2. Respondents' contentions do not give substance and application to their opinions. Judge Nafziger clearly admitted his bias and prejudice towards the Respondents by recusing himself. The Court of Appeals demonstrated its palpable bias and prejudice with many false statements, such as stating that there was a <u>requirement</u> for McKinneys to get a loan, when the only actual requirement was to <u>apply</u> for a loan with specific terms, which they did. To a slightly lesser, but noticeable, extent Judge Moroney revealed his bias and prejudice by failing to adhere to the unambiguous terms of

the contracts. For example, the 1988 contract required cancellation if the required mortgage commitment was not received by May 1, 1988, and it was not.

> "**MORTGAGE APPLICATION:** Buyers agree to apply promptly for a first mortgage loan on the above described property . . . with rights to prepay loan at any time without penalty, and with no more than two points. If Buyers have not been able to obtain a commitment for said loan on or before May 1, 1988, then this contract shall become null and void and the earnest money/down payments shall be returned to Buyers immediately." Record, I, 45.

The 1990 contract also failed when the Dicks did not furnish an unencumbered, marketable abstract of title by March 1, 1990 for the McKinneys' approval, which never came. Petitioners never approved the abstract of

title, despite the Court of Appeal's distortion of the 1990 contract's requirement:

> "13. **DEFAULT BY SELLERS:** In the event Sellers are unable or fail to furnish title [as discussed in paragraph 18] or possession as agreed in this contract, then, at the option of Buyers, this contract shall be terminated and all monies and considerations paid shall be refunded to Buyers." (Record, I, 56, par. 13)
>
> "18. **ABSTRACT OF TITLE:** Sellers and Buyers will furnish each other with Abstracts of Title to the above-described parcels of real estate certified to date showing merchantable title to said real estate, subject only to the exceptions herein set forth, if any. Buyers and Sellers shall then have a reasonable time to examine the same and make requirements in writing necessary to pass merchantable title as provided herein. In the event

any requirements are made, Sellers or Buyers shall have a reasonable time to correct said requirements needed to pass merchantable title. Buyers will deliver to Sellers the Abstract of Title and Deed to their property on or before February 10, 1990." Record, I, 58.

Moreover, the trial court in July 1993 allowed both contracts to die by granting Petitioners summary judgment on this point:

"66. Under Supreme Court Rule 141(b) if a litigant receiving a motion for summary judgment fails to answer after 21 days, the litigant "SHALL" be deemed to have admitted the uncontested contention of fact. Therefore all Defendants' contentions as a matter of law have been admitted and the Court is required to rule in favor of Defendants." Record, III, 856.

Essentially, due process requires fair treatment. *In re Robins Co., Inc.*, 107 F.R.D.

2 (D.C. Kan. 1985). For a hearing to afford an individual due process, a hearing tribunal must be impartial. *Constvet v. Boger*, 757 F.2d 223 (C.A. 10 Okla. 1985). A tribunal is not "impartial" if it is biased with respect to factual issues to be decided at hearing. Equal protection assumes that individuals who are similarly circumstanced shall be treated alike. *Hoffman v. U.S.*, 767 F. 2d 1431 (C.A. 9 Cal. 1985). The Fourteenth Amendment is applicable to all citizens. *Tyus v. Ohio Department of Youth Services*, 606 F. Supp. 239 (D.C. Ohio 1985). The rights created by the due process and equal protection clauses of the Fourteenth Amendment are guaranteed to the individual and the rights established are personal rights. *Shelly v. Kramer*, 68 S. Ct. 836, 334 U.S. 1, 92 L. Ed 1166 (U.S. Mo 1948)

THE TRIAL COURT DID NOT EXCLUDE PETITIONERS' ARGUMENT THAT THE 1990 CONTRACT FAILED

BECAUSE RESPONDENTS FRAUDULENTLY MISREPRESENTED THEIR ROAD ACCESS. 'In fact, the trial court decided that the Petitioners' argument is valid: the 1990 contract failed. How does reading the trial court's decision lead to the opposite conclusion? Respondents do not tell us. Reading the contracts lead to the conclusion that the terms of those contracts caused them to fail.

The trial court Judge Nafziger undeniably, by recusing himself, acknowledged that Court's bias and prejudice regarding the 1988 contract as well as the 1990 contract.

The Court of Appeals, however, demonstrates *far worse bias and prejudice* than Judge Nafziger in his flaunting and shocking partisan advocacy of the Respondents' positions: that Court's fabrications, undeniable distortions and/or misquotations of facts, and overt attempts to re-write both contracts to favor Respondents, even though Petitioners'

award of summary judgment was not appealed. In effect, the Court of Appeals judge continued where Judge Nafziger left off. Moreover, neither the Court of Appeals nor Respondents tell us which of Petitioners' approximately 80 points the trial court alluded to in its award of summary judgment to Petitioners. The Respondents should explain why, if the trial court really wished Respondents to win, they didn't award the court summary judgment to Respondents in the first place? Perhaps the only way to resolve the apparent dilemma of Judge Moroney's decision is to recognize that when saying "to comport with the above mentioned rulings," the learned judge must have meant *only* the rulings allowing the Respondents to keep the $6,000.00, because ***as a matter of law*** under Rule 141, both contracts died. It is absurd to contend that Petitioners won, on the one hand, but on the other

hand, to state that Petitioners really lost after winning.

The Court of Appeals has admitted that the contingencies of the 1988 contract were ***NOT*** satisfied, which means that it died. The Court of Appeals has also admitted that the Respondents did not ***TECHNICALLY*** answer motions for summary judgment under Rule 141. The Respondents' failure to answer under Rule 141 killed both the 1988 and the 1990 contracts.

First Argument: Page 10, lines 7-10. Rule 141 is mandatory, not discretionary. A reading of Rule 141 establishes this point.

First Argument: Page 11, first par. Petitioners object only to the extreme bias and prejudice of the Court of Appeal's decision. When numerous "facts" turn out to be lies, any honest man would object to such a violation of truth. Respondents' opinions do not alter the truth.

Second Argument: Page 11, par. 1. The Court of Appeals raised only one objection to the K.C.P.A. argument; it was shown to be false. The first reference by the Petitioners to the K.C.P.A. was in their amended petition of February 1991. Respondents failed to answer. They conceded the argument then. No arguments since then have overturned Petitioners' averments. Respondents still have not read the amended petition. In November, 1991, they arrogantly admitted in court that they no longer read the filings!

Since June 1991 Petitioners have been discussing the K.C.P.A. with quotations from it. See *Appellees' Brief of Cross-Appeal*, pp. 32-34. The trial court's objection was based solely on the erroneous opinion that the K.C.P.A. did not deal with real estate, which is wrong as was the Court of Appeal's erroneous belief that the Dicks were not "suppliers" as defined by the act. The McKinneys' argu-

ments have not been overturned by incorrect opinions.

Third Argument: Page 13, par. 1. Under the 1990 contract, damages ***are not available to Respondents***. To invent damages when they are not available and after both contracts died is discriminatory; there is not a level field and the McKinneys are threatened with loss of property. The fact that the word "broad-based" is not used in Judge Moroney's decision is of no value. Respondents cry for damages from the 1990 contract, but damages for Respondents are not discussed in the contract; foreclosure is. Respondents ignored it.

Third Argument: Page 14, second par. from bottom. The Respondents were relying wholly on the award of $6000 to Respondents as the basis for appealing for damages. Said award, however, was actually based on false state-

ments by the trial court and the Court of Appeals regarding the 1988 and 1990 contracts. The 1990 contract stated clearly:

> "This instrument contains the entire agreement between Buyers and Sellers respecting the properties and duties of Buyers and Sellers in relation thereto. Anything not expressly set forth or referred to in this contract is null and void." *Record I, 58.*

Damages are **NOT DISCUSSED** in the 1990 contract and damages were therefore not agreed to and were null and void; **THAT** is the intent of the contract, and the trial court expected its decision to end the litigation, ergo, no money beyond the $6,000 was awarded to Respondents. Petitioners' *Petition for Writ of Certiorari*, App. C. Nevertheless, the fairy tale of damages for Respondents was subscribed to by the Court of Appeals, and flies in the face of the trial court's decision and intent to end the litigation. Awarding "damages" would be in direct opposition to the explicit, above quoted agreement of the 1990 contract as

composed by the parties. Failure by Respondents to mitigate their damages for many months also prevented damages.

Third Argument: Par. 3. The trial court's award to Petitioners of summary judgment included recognition of mandatory law, Rule 141. The trial court judgment cannot arbitrarily rewrite mandatory Rule 141, with opinions contrary to fact. If comporting with the judge's opinions are followed, those opinions must be grounded on facts, not errors.

Third Argument: Last Par. These are Respondents' opinions. Petitioners have the right to a fair assessment of their case, not blind bias and prejudice.

Third Argument: Page 14, last par. Had the Kansas Supreme Court actually checked out the Court of Appeals' Opinion, they would have easily discovered many of the egregious flaws uncovered in Petitioners' *Petition for Writ of*

p.15, par.2, l.7. Change *are* to *is*.

Certiorari. They include demonstrable fabrications, deceptions, and denial of due process and equal protection.

Fourth Argument: Page 15. Mr. McKinney's medical condition was discussed extensively from the first meeting of the Dicks and McKinneys in 1988. Many pages in Petitioners' filings, from many doctors, various laboratory tests, as well as sworn testimony on the stand by Mr. McKinney under oath, have discussed his problems extensively. Respondents never denied this evidence; however, they now question it by innuendo. Petitioners' various motions reflect the very serious nature of his complex kidney and related problems. His doctors, in fact, recommend he discontinue this case because of the detrimental effect on his health; so far that has been impossible.

Serious discrimination against a permanently disabled person has clearly occurred. Judge Nafziger even stated that trial would be

conducted in Mr. McKinney's absence during scheduled medical treatment! Hearings were held when Mr. McKinney was incapacitated.

The problems have been discussed in Petitioners' motions for summary judgment and Petitioners' amended Petition on February 1, 1991, which Respondents never answered.

The trial court under Judge Moroney technically awarded summary judgment on this issue also, but it has been ignored by the Court of Appeals. Whether Petitioners can or cannot contract separate contracts is immaterial to this litigation, for Petitioners agreed only to a unified interest, based on certain conditions and contingencies which had to be satisfied before consummation of the sale.

Fourth Argument: Page 15. Respondents have read the medical evidence. Dr. John Lee, B.A. Honors, Harvard, M.D. Minnesota, has stated that Mr. McKinney was mentally unable

to sign a contract for the sale of real estate. The Petitioner has been forced by circumstances to represent himself because Mr. Senecal has been inundating the court with frivolous filings. The courts have cooperated with him.

Fourth Argument: Page 16, top par. It is ironical that the Respondents have persistently discriminated against Mrs. McKinney in this litigation. They did not furnish her with any copy of the abstract of title, so she could check it out, but they now wish to saddle her with fictitious damages. Is that a level playing field? This is worse than the "we won but we lost" philosophy.

Conclusion: Page 16, par. 1. Petitioners have alleged and presented evidence on the constitutional applicability based on the Fourteenth Amendment, a charge articulated in a number of places, among others, *Motion for Continuance*, Record, V, 98-100.

CONCLUSION

The bias and prejudice of Judge Nafziger cannot be debated, and has been detailed in Petitioners' Affidavit of Bias and Prejudice and elsewhere; it led to his recusal. The intent of his court was to discriminate against *these pro se litigants*; he wore his blinders all during the case before departing.

Judge Nafziger also attempted to conduct a trial while Mr. McKinney was absent receiving medical treatment! And he conducted hearings when Mr. McKinney could barely see the dim outline of the Judge because of an accident to his eye. The Affidavit of Bias and Prejudice and elsewhere cite examples of his bias and prejudice towards a permanently disabled person.

Kansas law candidly states: "Our legal system cannot function on any basis other than equal treatment of all litigants. To have

different rules for different classes of litigants [pro se, permanently disabled, female, Negroes, the rich, et al.] is untenable." *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, at 595, 730 P. 2d 1109 (1986)

Dick v. McKinney demonstrates that constitutional ideals are often ignored in the real world of Kansas power struggles. It is unconscionable that a person needs to be rich or defended by counsel to receive justice because our Constitution is for the huddled masses, the ordinary, as well as the rich and famous .

DATED this 14th day of March, 1994.

Respectfully submitted,

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